these instruments had no direct part in transportation or selling at terminal yards, they were convenient in stock dealings and tended to bring business to a town and to give it an advantage over a place where none existed. The railroad did not controvert the finding that discrimination existed. The Supreme Court, however, held that the order directing the installation of an additional scale amounted to the deprivation of property without due process of law, and that the commission should have given the railroad the alternative of abating the alleged discrimination by discontinuing the use of existing scales.[11]

The services complained of in this case unquestionably constituted a preference to the towns supplied, but it is interesting to note the further finding that they were wholly unconnected with the carrier in its relations with shippers. In this particular the Minnesota case differs essentially from the delivery cases, where the services, though likewise gratuitous, were performed by the carrier *as carrier* and bore a relation to the ordinary undertaking of carriers, *viz.*, the transportation and delivery of goods. The railroad, however, did not contest the finding that discrimination existed and merely attacked the order of the Commission because it was not in the alternative. The interesting question, therefore, whether a carrier may favor a town by a gratuity entirely unconnected with transportation was not presented.

Such cases assume importance chiefly as striking examples of the manner in which an apparently well-intentioned liberality on the part of carriers toward a considerable portion of their patrons is often frustrated by the objection of the minority to the apparent economic prejudice of the public at large. But upon the assumption that equality of opportunity is of paramount public importance no other conclusion is possible.

B. M. K.

CONSTITUTIONAL LAW—DOES A STATE WORKMEN'S COMPENSATION LAW APPLY TO AN EMPLOYEE OF AN INTERSTATE RAILROAD WHEN ENGAGED IN INTERSTATE COMMERCE?—The question as to whether the Federal Employers' Liability Act and a state workmen's compensation act can both be applied to regulate the liability of an interstate railroad for injury to an employee engaged in interstate commerce,—the former covering injuries resulting from negligence and the latter covering injuries not resulting from negligence,—has recently been decided in the affirmative by the New York Court of Appeals.[1]

The plaintiff was employed in connection with the general

[11] Great Northern Railway Company v. Minnesota, 238 U. S. 340 (1915).

[1] Winfield v. N. Y. Central & H. R. R. R., Weekly Underwriter (N. Y.), Nov. 27, 1915, p. 667.

repair and maintenance of the tracks of the defendant railroad. While tamping ties, he was struck in the eye by a stone which came up from the ground. An award of compensation to the workman under the state act was upheld on the ground that the federal act is an assumption of Congressional control only as to liability for injuries resulting from negligence, thus leaving the field of liability for injuries not resulting from negligence open to state regulation.

That this workman was engaged in interstate commerce and hence entitled to recovery only under the federal act, if his injury had been the result of negligence, is, in view of the facts of the decided cases, a conclusion over which there can be no dispute and which was so considered in the principal case. A case in the Supreme Court of the United States,[2] in which a workman who was carrying bolts to be used in repairing a bridge over which interstate trains were run, was held to be engaged in interstate commerce, is illustrative of this line of decisions.[3]

But since the injury was the result not of negligence, but of unavoidable accident, the question whether a recovery can be had under the state act is governed by two considerations, *viz.*: first, whether the regulation of the liability of interstate railroads to their employees for injuries received while engaged in interstate commerce is exclusively within the control of Congress by virtue of Article I, Section 8, Clause 3 of the Constitution and hence prohibited to the states regardless of any action by Congress, or whether it is a subject matter concerning which the states may legislate until Congress has prohibited such legislation by itself regulating the subject matter in whole or in part; and second, if the latter proposition be found to be true, whether the general subject of the liability of interstate railroads to its employees engaged in interstate commerce can be said to consist of two separate and distinct subject matters, one the liability for injuries resulting from negligence and the other the liability for injuries not resulting from negligence, so that Congressional legislation as to the first liability does not preclude state legislation as to the second liability.

The first problem can readily be resolved in favor of the second alternative. The proposition that, in the absence of Congressional action, the state has the right, in the exercise of its police power, to enact laws determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce, admits of no argument.[4]

[2] Pedersen v. Delaware, L. & W. R. R., 229 U. S. 146 (1913).

[3] See also St. L.. San Francisco, *etc.*, Rwy. v. Seale, 229 U. S. 156; N. Y. Central R. R. v. Carr, 238 U. S. 260 (1915); Ross v. Sheldon, 154 N. W. 499 (Iowa 1915). See also the annotation of the last of these cases, elsewhere in this issue of the REVIEW, 64 UNIV. OF PENNA. L. REV. 312.

[4] Second Employers' Liability Cases, 223 U. S. 1, 55 (1912); Missouri Pac. Rwy. v. Castle, 224 U. S. 541, 544 (1912); Mich. Central R. R. v. Vreeland, 227 U. S. 59, 67 (1913); Weir v. Rountree, 173 Fed. 776 (1909).

Another proposition which has passed the stage of controversy is that when Congress does act in regard to matters which have previously been the proper subjects of state regulation, the exercise of its authority overrides all conflicting state legislation upon the same subject matter.[5] This leaves as the disputed point in the principal case the question whether this liability for injuries to employees engaged in interstate commerce is capable of division into liability based upon negligence and liability not based upon negligence.

A review of the decisions in similar cases fails to throw much light on the probable attitude of the United States Supreme Court, when the case is presented for final disposition by it. In the cases involving the Federal Hours of Service Law,[6] the statutes declared unconstitutional were unquestionably regulations of the same subject concerning which Congress had already acted. As an illustration, the act of Congress having provided that a certain class of employees should not remain on duty for more than nine hours in every twenty-four, a New York statute, which provided that such class of employees should not remain on duty for more than eight hours in every twenty-four, was held unconstitutional.[7] In the cases involving the use of ferries, the inference, if any can be drawn, is that the principal case was wrongly decided. The Interstate Commerce Act [8] defines the term "railroad" as including "all bridges or ferries used or operated in connection with any railroad." Under this clause it has been held that as to a ferry operated by a railroad an ordinance of a state, fixing the rates for passengers using the ferry not in connection with the railroad, is void, since the entire regulation of such a ferry is within the control of Congress.[9]

Certain expressions of opinion by the Supreme Court likewise seem to indicate that they regard the Federal Employers' Liability

[5] Cooley v. Board of Wardens, 12 How. 299 (1851); Gloucester Ferry Co. v. Penna., 114 U. S. 196 (1885); Southern Ry. Co. v. Reid, 222 U. S. 424 (1912).

[6] Act of March 4, 1907, 34 Stat. 1415, c. 2939.

[7] Erie R. R. v. New York, 233 U. S. 671 (1914). See also Nor. Pac. Rwy. v. Washington, 222 U. S. 370 (1912).

[8] Act of February 4, 1887, c. 104, 24 Stat. 379.

[9] N. Y. Central R. R. v. Hudson Co., 227 U. S. 248, 263 (1913). "It is insisted that as the text [of the Interstate Commerce Act] only embraces railroad ferries and the ordinances were expressly decided by the court below only to apply to persons other than railroad passengers, therefore the action by Congress does not extend to the subject embraced by the ordinances. But as all the business of the ferries between the two states was interstate commerce within the power of Congress to control and subject in any event to regulation by the state as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried in by means of the ferries, free from control by the state." See also Port Richmond Ferry v. Hudson Co., 234 U. S. 317 (1914).

Act as being an assumption of Congressional control over the entire field of liability of interstate railroads to their employees engaged in such commerce, although in the particular cases, the distinction between the two kinds of liability was not important and not emphasized. In *Seaboard Air Line* v. *Horton*,[10] it was said: "It was the intention of Congress [in the Federal Employers' Liability Act] to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence." And in an earlier case, *Mich. Central R. R.* v. *Vreeland*,[11] the court said: "It therefore follows that in respect to state legislation prescribing the liability of such [interstate] carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive and must remain so until Congress shall again remit the subject to the reserved police power of the states."

However, as is pointed out by Mr. Justice Seabury in his opinion in the principal case, it must be remembered that a workmen's compensation law is radically different in principle, purpose, scope and method from an employers' liability act, and this difference is entitled to due consideration. It should also be noted that the New York legislature, in passing the compensation act, contemplated the present exigency by expressly providing that the act should not apply to employees engaged in interstate commerce, for whom a rule of liability or method of compensation had been or may be established by the Congress of the United States.[12]

P. C. W.

CONSTRUCTIVE TRUSTS—CAN A MURDERER ACQUIRE TITLE BY HIS CRIME AND KEEP IT?—The authorities are most decidedly in conflict in determining the status of one who murders another and then seeks to acquire property as a result of his crime. This situation does not present itself as infrequently as one might suppose. The problem usually arises where a beneficiary in a life insurance policy slays the person whose life was insured, but it also occurs from time to time where a devisee claims under the will of his victim or where the murderer is the statutory heir of him whose life he has taken.

One line of decisions, impressed by the obvious injustice of allowing the criminal to prosper as a result of his wrong, reaches the conclusion that the murderer does not acquire title to the property at all. This is the view universally held with regard to the

[10] 233 U. S. 492, 501 (1914).

[11] *Supra*, note 4.

[12] N. Y. Laws of 1914, c. 41, § 114; Matter of Jensen v. Southern Pac. Co., 215 N. Y. 514 (1915).